

STATE OF MICHIGAN
COURT OF APPEALS

DETROIT BOAT CLUB,

Plaintiff-Appellant,

v

SHORE CLUB APARTMENTS & MARINA and
TED GATZAROS,

Defendants-Appellees.

UNPUBLISHED

April 12, 2002

No. 229318

Macomb Circuit Court

LC No. 1999-000223-CZ

Before: Doctoroff, P.J., and Cavanagh and Gage, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendants' motion for summary disposition. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

A representative of plaintiff Detroit Boat Club (plaintiff) and defendant Ted Gatzaros (Gatzaros) discussed the relocation of plaintiff's operations from Belle Isle in Detroit to defendant Shore Club Apartments & Marina (Shore Club) in St. Clair Shores. On January 24, 1996, Gatzaros sent plaintiff a letter in which Gatzaros expressed an offer to plaintiff's membership of dockage and other amenities at Shore Club. In this letter, Gatzaros wrote that defendants were prepared to build a facility for plaintiff at the Marina to be used by plaintiff's members as a clubhouse, "subject to zoning approval." The letter also stated: "The construction of this club facility could be completed within six (6) months of an agreement."

Gatzaros spoke with the St. Clair Shores city attorney about the possibility of rezoning a portion of the Shore Club property to allow for the construction of the clubhouse. According to Gatzaros, the city attorney told him that rezoning was "totally out of the question," and Gatzaros did not further pursue the matter. Plaintiff did not investigate the rezoning issue. Defendants never constructed plaintiff a clubhouse. Plaintiff brought this action, alleging that defendants breached the parties' agreement. Plaintiff raised claims of breach of contract, fraud in the inducement and misrepresentation, and misrepresentation under the Lanham Act, 15 USC 1125.

Defendants moved for summary disposition pursuant to MCR 2.116(C)(8) (failure to state a claim) and MCR 2.116(C)(10) (no genuine issue of material fact). The trial court found that there existed a genuine issue of material fact regarding whether the letter constituted a binding agreement, but found that the proposed clubhouse was subject to zoning approval and

that it did not state what means defendants would use to obtain that approval. It found that defendants were excused from further performance under the contract because the condition precedent had not been satisfied. It also found that because many of plaintiff's members refused to sign required dockage agreements and pay certain rental fees, plaintiff first breached the agreement and therefore may not maintain an action against defendants for defendants' failure to perform under the contract. The court also found that the misrepresentation claim should be dismissed because Gatzaros' statements regarding rezoning did not relate to a past or existing fact and the evidence indicated that he acted in good faith. Finally, the court dismissed plaintiff's federal claim.

Plaintiff argues only that the trial court erred in finding that there was no genuine issue of material fact regarding the alleged misrepresentations. We disagree.

To establish fraud, the plaintiff must demonstrate that (1) the defendant made a material misrepresentation; (2) the misrepresentation was false; (3) the defendant made the misrepresentation either knowing it to be false or recklessly, without knowledge of its truth and as a positive assertion; (4) the defendant made the misrepresentation with the intention that the plaintiff should act on it; (5) the plaintiff acted in reliance of the misrepresentation; and (6) the plaintiff suffered injury as a result. *Kassab v Michigan Basic Property Ins Ass'n*, 441 Mich 433, 442; 491 NW2d 545 (1992). The misrepresentation alleged in support of a fraud claim must be based on a statement of past or existing fact. *Michaels v Amway Corp*, 206 Mich App 644, 652; 522 NW2d 703 (1994). "A mere promise that is broken is neither fraud nor evidence of fraud." *Id.*

In this case, plaintiff's misrepresentation is premised on Gatzaros' statements that the rezoning of the property at issue would not be a problem because Gatzaros had a relationship with the City of St. Clair Shores. Clearly, the representation regarding the likelihood of success of a request for rezoning is not based on a statement of past or existing fact, it is more like a promise that Gatzaros did not keep. A claim for misrepresentation predicated on such a fact must fail. The trial court did not err in granting defendants summary disposition on this basis because there is no genuine issue of material fact regarding the alleged misrepresentation.

Affirmed.

/s/ Martin M. Doctoroff

/s/ Mark J. Cavanagh

/s/ Hilda R. Gage